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THE PRESENT AND FUTURE OF THE LAW OF EVIDENCE.

SIR HENRY MAINE had occasion, thirty years ago, to make some special study of the English system of Evidence, in attempting to adapt it to the use of his countrymen in governing India. In letting his intelligence "play freely over the subject," he was led to remark that "the theory of judicial evidence is constantly misstated or misconceived even in this country [England], and the English law on the subject is too often described as being that which it is its chief distinction not to be, — that is, as an *Organon*, — as a sort of contrivance for the discovery of truth which English lawyers have patented." And after pointing out that their law of evidence grew out of the jury system, he adds truly that "the English rules of evidence are never very scrupulously attended to by tribunals which, like the Court of Chancery, adjudicate both on law and on fact, through the same organs and the same procedure."

And yet the system is very highly praised. Why then should it be so quickly abandoned when the jury is gone? If we should take too literally the undiscriminating statements of some writers, we might well wonder that so fine a thing should not always be used. A distinguished author tells us, at the end of a famous treatise:[1] "The student will not fail to observe the symmetry and beauty of this branch of the law; . . . and will rise from the study

[1] Greenl., Evid., i. s. 584.

of its principles convinced, with Lord Erskine, that 'they are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life.'"

I think that it would be juster and more exact to say that our law of evidence is a piece of illogical, but by no means irrational, patchwork, not at all to be admired, nor easily to be found intelligible, except as a product of the jury system, as the outcome of a quantity of rulings by sagacious lawyers, while settling practical questions in presiding over courts where ordinary, untrained citizens are acting as judges of fact. In any other aspect largely irrational, in this point of view it is full of good sense; — a good sense, indeed, that occasionally nods, that submits too often to a mistaken application of its precedents, that is often short-sighted and ill-instructed, and that needs to be taken in hand by the jurist, and illuminated, simplified, and invigorated by a reference to general principles.

As regards Erskine's often-quoted remark above quoted, quite too large and general a reach has been imputed to it. It was a part of the famous opening argument in Hardy's Case, in 1794, and had reference to the great advocate's unsuccessful contention against one of the most extraordinary, characteristic, and subsequently discredited results of English adjudication. His client was charged with the treason of compassing the King's death, and with the overt act of a conspiracy to depose him. Erskine had been inveighing bitterly against a doctrine which the court afterwards enforced against his client in its most uncompromising shape — the doctrine, namely, that in such a case proof of the conspiracy to depose was, in legal effect, proof of compassing the death, and not merely evidence of it; and this by virtue of an indisputable "presumption." "The conspiracy to depose the King," said Eyre, C. J., in his charge to the jury,[1] "is evidence of compassing and imagining the death of the King, conclusive in its nature, so conclusive that it is become a presumption of law, which is in truth nothing more than a necessary and violent presumption of fact, admitting of no contradiction." Such a doctrine, of course, while exhibiting itself in a dress of evidence and presumption, is, in reality, a very different matter; it is really a doctrine of the substantive law of treason; grounded, indeed, upon a conclusion of evidence, upon what is usually true in such cases, but none the

[1] 24 St. Trials, col. 1361.

less a doctrine which has now passed out of the sphere of evidence, and even out of the legitimate sphere of presumption, and has become an incontrovertible doctrine of the substantive criminal law. As against this hard, judicially legislated principle, Erskine had contended that the overt act was only a piece of evidence; that the intent to kill the King was to be proved to the jury by evidence which really convinced them beyond a reasonable doubt; that a conspiracy to depose might or might not, according to the circumstances of the particular case, suffice to prove the intent to kill; and that the jury must themselves be satisfied that it did. "My whole argument," he said, in substance, towards the end, "is only that the crime of compassing the King's death must be found by you, really *believed* by you, and beyond a reasonable doubt. You are to go upon the ordinary rules of evidence; not upon precedents coming down from evil times. The rules of evidence as they are settled by law and adopted in its general administration, are not to be overruled or tampered with. They are founded in the charities of religion," etc. Erskine was not engaged in any general estimate of the English law of evidence; he was pressing home a particular point, and condemning a certain contention as barbarous and inconsistent with those general principles which secured to a prisoner the free, unfettered exercise of the jury's judgment, instead of driving them to a verdict by an irresistible legal rule.

I have said that our law of evidence is ripe for the hand of the jurist. I do not mean for the hand of the codifier; it is not; but for a treatment which, beginning with a full historical examination of the subject, and continuing with a criticism of the cases, shall end with a restatement of the existing law, and with suggestions for the course of its future development. Such an undertaking, worthily executed, if it should commend itself to the bench, would need only a slight coöperation from the legislature to give to the law of evidence a consistency, simplicity, and capacity for growth which would make it a far worthier instrument of justice than it is.

Let us look at this part of our law, and consider (1) What, in fact, we have now; (2) What we should have, and how to get it.

I. We have now, as our law of evidence, in the form in which it is ordinarily stated, a set of rules of great volume and complexity, occupying, with the illustrations thought needful for their exposition, twelve hundred and thirty-four octavo pages in Taylor's last

(9th) edition of his work on Evidence,— a book which was originally an adaptation of Greenleaf's book, but was afterwards expanded, and now constitutes the chief English book on this subject. The few principles which underlie this elaborate mass of matter are clear, simple, and sound. But they have been run out into a great refinement of discrimination and exception, difficult to discover and apply, and have been overlaid by a vast body of rulings at *nisi prius*, and decisions *in banc*, impossible to harmonize or to fit into any consistent and worthy scheme. A great portion of these rules, as laid down by the courts and by our text writers, are working a sort of intellectual fraud by purporting to be what they are not. To the utter confusion of all orderly thinking, a court is frequently represented as passing on questions of evidence when in reality it is dealing with some other branch, either of substantive law or procedure. The rules are thus in a great degree ill-apprehended, ill-stated, ill-digested. Sometimes, as in the case of proving attested documents, they have come down out of practices and rules of mediæval procedure by a slow process of change that has concealed their pedigree and their real nature and basis; and then rules of this sort come to be applied or refused application merely according to their letter, or according to some false imagination of reasons, with grotesque results, and in a manner fanciful and unintelligent. Sometimes our rules have sprung from following on after some single specific ruling at *nisi prius*, wise, perhaps, in the particular case, but having in it no general element or principle which should make it a precedent; and sometimes, on the other hand, from dealing with such a ruling, as if it were only a narrow and particular precedent, failing to recognize its true character as illustrating a large principle of sense and convenience, fit to be spread into a general application. In part the precepts of evidence consist of many classes of exceptions to the main rules,— exceptions that are refined upon, discriminated, and run down into a nice and difficult attenuation of detail, so that the courts become lost, and forget that they are dealing with exceptions; or perhaps are at a loss to say whether the controlling principle is to be found in the exception or in the general rule; or whether the exception has not come to be erected into a rule by itself. In part our rules are a body of confused doctrines, expressed in ambiguous phrases, Latin or English, half understood, but glibly used, without perceiving that ideas, pertinent and just in their proper places, are being misconstrued and misapplied.

Let me, in part, illustrate what I mean. There is a great bulk of cases, constantly added to, which are referred to what is known as the "parol evidence rule." Generally speaking this rule, relating to documents of the solemn and formal kind, undertakes to secure to them their proper legal operation as against less formal extrinsic acts and utterances of the writer. "Parol contemporaneous evidence," we are told, "is inadmissible to contradict or vary the terms of a valid written instrument."[1] Now so crudely-conceived and so ill-digested is the mass of matter under this head, which every day and many times a day our courts are called on to interpret and apply, that, in reality, vastly the greater part of it, almost all of it, has no proper place in the law of evidence, being chiefly made up of rules in the substantive law of documents, such as wills and contracts, and of rules of construction and interpretation. What is the result of this? Utter confusion of thought, and frequent injustice in decision. Of course when men are, in reality, discussing a question in the law of partnership, agency, or bankruptcy; or the grounds and scope of equity jurisdiction in dealing with fraud, mistake, trusts, or the reforming of documents; or the rules for the construction and interpretation of language; and yet, out of an imagination that they are dealing with rules of evidence, go on to clothe their ideas in the phraseology of that subject; although a right result may be reached, it is not rightly reached, and bewilderment attends it. There is a question, let us say, of reforming a will by inserting words which are not in it; the decision is disguised by saying that parol evidence is not admissible for this purpose; whereas, if the purpose were legitimate the evidence would be good enough. There is a question of denying operative effect to a contract in writing which has been signed, is in the hands of the other party, and is in form complete; the question is, Have you a legal ground of action or defence in saying that it was not to go into effect till the happening of some event which has not happened, and was not named in the writing? This is called a question of admitting parol or extrinsic evidence. There is a question of whether you can set up the defence of mistake in a common-law action, or whether you must go into equity. That is called a question of admitting parol evidence. There is a question of whether an undisclosed principal can sue or be sued on a written contract signed only by his agent's

[1] Greenl., Evid., i. s. 275, quoting Phil. & Am. Evid.

name; or whether you can avail yourself of an implied warranty when the contract of sale was in writing and says nothing of a warranty. These are called questions of whether parol evidence is admissible. And if the agreement be under seal, the doctrine that the seal of the agent cannot bind the principal, is disguised by saying that parol evidence is not admissible to make the principal responsible. There is a question, in case of a misdescription in a will, whether a given person may take; and this masquerades under the form of an inquiry whether parol evidence is admissible to correct the mistake.

This error is deeply ingrained in our cases; and it is a subtle one. But you cannot possibly deal thoroughly and scientifically with this part of our law until the error is cast out; until it is purged of that mass of substantive law, and of mere rules of procedure, and reason, and logic which overload it. There was a time when all that was said or read to the jury was spoken of as said *en evidence al jury*. The contrast in mind when this was said, was between saying something to the court, in pleading (in the days of oral pleading), and saying it to the jury. But now, for two or three centuries, we have been discussing the admissibility of what is offered in evidence, under a new branch of law, called the rules of evidence; as contrasted with its admissibility under the law of pleading and practice, and the substantive law. The old general question of admissibility has become specialized. If it was said, six centuries ago, that you could or could not say a thing *en evidence al jury*, it was because it was or was not matter to be said in pleading and entered on the record; or else because it was or was not logically relevant and material to the issue between the parties. Nowadays it may be excluded for the reason that, although relevant and material to the issue, and not at all matter of law, although properly addressed to the jury as contrasted with the court, yet it is excluded by this modern set of rules called the law of evidence. It is the characteristic of these rules to shut out what is relevant; not all that is relevant, — Heaven forbid! — but some things that are relevant, and notwithstanding they are relevant. There are many reasons for excluding what is offered in evidence, that have no relation to the law of evidence. If a thing be excluded because it is not within the scope of the general issue, it is excluded by the law of pleading; if, under the substantive law of the case, what is offered has nothing to do with the question, then it is the substantive law of the case that excludes; if what is offered has no logical

relation to the case, then it is the rule of reason that rejects it; or a party may be estopped from setting up what he offers evidence to prove. But when matter of fact bearing on the issue is excluded for none of these reasons, yet lawfully, it is the law of evidence that is working. As when the question is whether you may offer the sworn affidavit of a trustworthy eye-witness, not personally present in court, or a testator's extrinsic statement, when signing his will, that he meant one person rather than another of similar but not identical name; the exclusion in such cases is made by the rules of evidence; what is offered is relevant and material, but still is inadmissible.

It is then fundamental that not all determinations admitting or excluding evidence are referable to the law of evidence. Far the larger part of them are not. An innumerable company of questions, of the sort just alluded to, very often — more often than not, nay, much oftener than not — are dealt with in our text-books and cases as belonging to the law of evidence, when they ought to be carried to the border line of this subject and respectfully deposited on the other side. Most of the affirmative declarations in our books that evidence is admissible, belong to this class; and a very great proportion of those which hold it not admissible. As regards relevancy, in determining merely what is logically relevant to any point and what is relevant according to the standards of general experience, it is not the law that guides us; except, indeed, as it refers us to these universal standards, already known or ascertainable. For the law, being a human contrivance or outgrowth, and resting, as if by gravity, on human nature, human experience, and the principles that regulate human thought, takes all these things for granted. It does not undertake to re-enact them, still less to displace them, or to lift itself off this ground by its own boot-straps. To impute to it any such efforts is a suggestion as untrue historically, as these endeavors would be idle and superfluous in point of reason.

There is another great class of cases, germane to these just mentioned, but, unlike them, really belonging to the law of evidence, where the decision turns on the just application of certain large and inexact principles, — principles that may be likened to that which a jury has to apply in determining whether conduct in certain cases conforms to the standard of the prudent man. The law of evidence undoubtedly requires that evidence to a jury shall be

clearly relevant, and not merely slightly so; it must not barely afford a basis for conjecture, but for real belief; it must not merely be remotely relevant, but proximately so. Again, it must not unnecessarily complicate the case, or too much tend to confuse, mislead, or tire the minds of that untrained tribunal, the jury, or to withdraw their attention too much from the real issues of the case. Now in the application of such standards as these, the chief appeal is made to sound judgment; to what our lawyers have called, for six or seven centuries at least, the discretion of the judge. Decisions on such subjects are not readily open to revision; and, when revised, they have to be judged of in a large way; this is expressed by saying that the question is whether the discretion has been abused, has been unreasonably exercised. Doubtless, in some classes of such cases, there may have grown up a sub-rule which limits the discretion. In such cases, since there is not an unfettered discretion, an ordinary additional question of law arises as to the application of this subsidiary rule. But, in general, the question of law is not an ordinary one, because it ties itself to an outside, non-legal standard; viz., that of good sense, common experience, the sound judgment of men of affairs. When, for example, on a question of negligence in driving a horse across a railroad, you offer evidence of a single instance where a third party drove safely over at another time, under like conditions; or, in another case, evidence of ten separate instances of doing this; and in both cases it is rejected; it is easy to see that a revising court might properly enough sustain both rejections, while themselves disapproving of both; — sustaining and yet disapproving of the first, because the evidence was slight and conjectural, and yet might be thought by a trial judge sufficiently relevant and helpful; and the second, because, while it seemed, in point of quality, fairly clear and strong and probative, it tended to confuse the case by its multiplication of instances, and because there were other simpler ways of proof open to the party, such as the opinion of experienced observers or a view by the judge or jury.

In such cases it is a question of where lies the balance of practical advantage. To discuss such questions, as is sometimes done, on the bare ground of relevancy, — even if we introduce the poor notion of legal relevancy, as contrasted with logical relevancy, — tends to obscure the nature of the inquiry. There is, in truth, generally, no rule of law to apply in answering such questions as whether the evidence, although probative, is too slight, conjectural,

or remote; or whether it will take too much time in the presenting of it, in view of other practicable ways of handling the case; or whether it will complicate and confuse the case too much. There is no rule and no principle which forbids delay, tediousness, and complication, pure and simple, and always; what is forbidden is unnecessary complication, delay, and tediousness. These things are discouraged; but often they are unavoidable. When the nature of the issue requires it, enormous dangers of this sort have to be run. Consider the Tichborne case, the Tilton *v.* Beecher case, the Guiteau case, and the great will case of Wright *v.* Tatham which turned up so often in the English books sixty years ago; or consider any hard-fought case raising the question of insanity. In such controversies a range of inquiry is allowed of almost indefinite width, one which covers the behavior of a party during his whole life, and even travels over into that of all his near relations.

In this region of the law of evidence much confusion results from an inexact apprehension of the nature of the questions, and of the appropriate method of handling them on appeal. Often it is not perceived that what appears to be a mistaken determination of such points at the trial, is simply a more or less important mistake in practical judgment, and not at all a mistake in law. Judges, and whole benches of them, may decide such questions differently, while perfectly agreeing on the rule of law.

There is a great head of the law of evidence, comprising, indeed, with its exceptions, much the largest part of all that truly belongs there, forbidding the introduction of hearsay. The true historical nature of this rule is hinted by the remark of an English court, two centuries ago and over, when it checked the attempt of a woman to testify what another woman had told her. "The court," it was quietly remarked, "are of opinion that it will be proper for Wells to give her own evidence." That is to say, the objection went to the medium of communication; witnesses before the jury, in giving ordinary testimony, had by that time been allowed for some three centuries; but it must be *un oyant et veyant*, a hearer and seer, as they said in the older Year Books; one who could say as the witnesses to courts in older times always had to say, *quod vidi et audivi;* it must not be testimony at second hand. When juries, who were originally themselves witnesses as well as triers, came to be helped regularly by the testimony of other witnesses, it was only by such as personally knew the truth of what they were saying, and not by

witnesses who only knew what some one else had said to them. Juries, indeed, could say what they "knew;" but witnesses to juries could only say what they had seen and heard. In the first half of the fourteenth century the judges laid this down as applicable to attesting witnesses. What it meant was that while juries could form opinions from anything they knew, the verdict being given at their peril, while they might act on what they had picked up in any way, and might form a judgment upon such foundations which would count as knowledge, — witnesses could not do this, or rather were not to state it if they did, were not to say what they "thought," or "believed," or had heard from others, or concluded from what we now call circumstantial evidence. This contrast between the function of the jury and that of witnesses, which made it necessary to discriminate and define these points five or six hundred years ago, as regards the preappointed witnesses who went out with the jury, — even before witnesses were ordinarily allowed to testify to juries, — has led to a steady and rigid adherence to the general doctrine of hearsay prohibition.

But there came a large and miscellaneous number of so-called "exceptions." Some of these were really quite independent rules, whose operation was rather that of qualifications and abatements to the generality of this other doctrine, — rules which were coëval with the doctrine itself or much older. For example, it seems always to have been true, in cases of homicide, that the dying declarations of persons killed were reported and acted on in judicial proceedings. We find these used by a complaint witness as far back as 1202,[1] and used in evidence to the jury in 1721.[2] Such declarations in early times, and even in late times, had a peculiar credit allowed them. So in tracing pedigree the family hearsay seems always to have been resorted to. This matter, before jury trial was developed, used to be tried by witnesses,[3] who stated circumstantially how they knew what they said; and hearsay from the family, if confirmed by circumstances, was, probably, always a basis for their testimony. Family hearsay had the aspect of family reputation; and reputation was often reckoned an adequate ground for judicial action. In the thirteenth century we find a witness, in proving another person's age, giving as the basis of his testimony

[1] 1 Seld. Soc. 11; and see, what looks to be about a quarter of a century later, another case in Pl. Ab. 104.

[2] R. *v.* Trantor, 1 Strange, 499.

[3] Thayer, Preliminary Treatise on Evidence, 19–21.

the fact of the mother's recording the age in the records of a Priory, which record he had seen.[1] In matters affecting a whole parish or a large number of persons, the hearsay and reputation of those belonging in the given community was always regarded as good.

There was another special class of unsworn statements which had always been resorted to in judicial proceedings and admitted to the jury, viz. written ones, — entries in registers, in a parson's books, in the account books of stewards, in a merchant's books, in contracts, deeds, wills, and other documents. It is not true, so far as I know, that a mere testimonial writing not under seal, which purported to state only what another person had said to the writer, would ever have been received, any more than an oral statement of the same kind; but documents had been regularly shown to juries always, long before witnesses were received to testify to them. In the early days they did not stick, it would seem, at showing the jury any document that bore on the case, without even thinking of how the writer knew what he said. As regards ancient matters, writings very imperfectly authenticated were one of the chief sources of information, and often the only one. It appears, then, that a number of the so-called "exceptions" to the hearsay prohibition came in under the head of written entries or declarations; they came in, or rather, so to speak, stayed in, simply because they had always been received, and no rule against hearsay had ever been formulated or interpreted as applying to them. Such things, continuing at the present day, are, *e. g.*, the admission of old entries and writings in proof of ancient matters, written declarations of persons deceased against interest, and in the course of duty or business; and, to a limited extent, a merchant's own account books to prove his own case, — a thing clearly recognized as customary and allowable in an English statute of 1609, nearly three centuries ago, but insensibly, and often ignorantly, much qualified afterwards. So also of regular entries in public books, a matter probably never even doubted to be admissible in evidence.

In addition to all these ancient and always approved practices in their simple, original shape, operating as qualifications of the hearsay prohibition, there have come in many extensions of these; as when oral declarations of deceased persons against interest were received, and, in England, even oral declarations of deceased persons in the

[1] Pl. Ab. 293, col. 1.

course of duty or business. And not only has the scope of these old titles been enlarged, but new exceptions have been added; or perhaps they are rather old ones coming to be recognized and formulated; such as those relating to the *res gesta*, *i. e.*, declarations which make a part of some fact which is itself admissible, and declarations of present intention or present physical sensation. Such things are the natural development of the subject.

Now a great deal of perplexity exists, in the law relating to hearsay, from a failure to understand the scope of these exceptions; and from an uncertainty whether and how far they are to be freely developed, or to be strictly limited, as being mere exceptions, while the main rule itself which prohibits hearsay is freely developed. Sometimes one thing is done and sometimes the other. For example, in a leading case in the House of Lords, in 1880,[1] Lord Blackburn, in discussing a question of hearsay and rejecting the evidence, said: "I base my judgment upon this, that no case has gone so far as to say that such a document could be received; and clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible." On the other hand, Sir George Jessel, in a very different tone, in 1876,[2] had declared it to be the court's duty to extend the exceptions to the hearsay rule, out of "regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases." It seems a sound general principle to say that in all cases a main rule is to have extension, rather than exceptions to the rule; that exceptions should be applied only within strict bounds, and that the main rule should apply in cases not clearly within the exception. But then comes the question, what is the rule, and what the exceptions? There lies a difficulty. A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, viz., that whatsoever is relevant is admissible. To any such main rule there would, of course, be various exceptions; but as in the case of other exceptions, so in the hearsay prohibition, this classification would lead to a restricted application of them, while the main rule would have freer course. One mischief, about the present state of our law is that it shows a spasmodic and half-recognized acceptance of such a theory in particular instances,

[1] Sturla *v.* Freccia, 5 App. Cas. 623.

[2] Sugden *v.* St. Leonards, 1 Prob. Div. 154.

while rejecting it generally. For example, there is, sometimes, a tendency to regard a hearsay statement as admissible if it be one of a set of facts giving and reflecting credit, each to the other, — on the principle of what is called circumstantial evidence. This brings in confusion, for our law really goes but a very little way in that direction. No doubt, in point of reason, hearsay statements often derive much credit from the circumstances under which they are made; say, *e. g.*, from the fact of being made under oath, or under impressive conditions, as being against interest, or made under strong inducements to say the contrary, or as part of a series of statements, or a class of them, which are usually careful and accurate, and the like; credit amply enough in point of reason to entitle them to be received as evidence, when once the absence of the perceiving witness is accounted for; and it would in reason have been quite possible to shape our law in the form that hearsay was admissible, as secondary evidence, whenever the circumstances of the case alone were enough to entitle it to credit, irrespective of any credit reposed in the speaker. This point of view is forever suggesting itself in that part of the subject relating to declarations which are a part of some admissible fact, — of the *res gesta*, as the phrase is. They are often here spoken of as parts of a mass of circumstantial facts, supporting and supported by each other in their tendency to prove some principal fact; instead of being regarded, as they should be, as parts of that fact itself, *pars rei gestæ*, lying under the curse of hearsay, but received, by way of exception, on account of this special intimacy of connection with the admissible fact. This part of the subject presents an instructive spectacle of confusion resulting from the desire, on the one hand, to hold to the just historical theory of our cases; and, on the other, to resort to first principles, without being aware of the size and complexity of the task which is thus unconsciously entered upon.

I need not linger long on the two or three other chief topics in the law of evidence. The rules, roughly thus intimated, which forbid the giving of opinion evidence and of character evidence are leading and important. As to the former it is traceable easily to the same source as the hearsay rule. It was for the jury to form opinions, and draw inferences and conclusions, and not for the witness. He was merely to bring in to the jury, or the judge, the raw material of fact, on which their minds were to work. If the witness spoke directly to the very fact in issue, the jury were to

consider whether to believe his statements or not; if to other facts, of an evidential sort, then the jury were to judge of their import and their tendency. The witness was not to say that he "thought" or "believed" so and so; it was for the jury to state what they thought and believed. The witness must say what he had "seen and heard;" he was an "*oyant et veyant.*" But then, simple as all this sounds, the distinction could not serve in many nice and critical inquiries. In the loose and easy administration of the law of trials that existed as long as juries went on their own knowledge, and needed no witnesses or evidence at all, and at a time when, even if they had witnesses, they were at liberty to disregard them and to follow their own personal information, it was possible to get along without nice discriminations; so that the law of evidence had hardly any development at all until within the last two centuries; and it was but slight before the present century. In a sense all testimony to matter of fact is opinion evidence; *i. e.*, it is a conclusion formed from certain phenomena and certain mental impressions. Yet that is not the way we talk in courts or in common life. Where shall the line be drawn? When does matter of fact first become matter of opinion? A difficult question. But some things are clear. There are questions which require special training and knowledge to answer them. A jury, unless it be one of experts, and, as such, ill adapted, perhaps, for the general purposes of trials, cannot deal with them. On such questions, then, the ordinary jury may be assisted by skilled witnesses, who give their opinions. There are other questions, not requiring skill or training, but only special opportunities of observation, like handwriting, and the value of property, on which opinions of ordinary witnesses having such opportunities may be given. How far does this go? There is much apparent perplexity in the cases. In a very great degree it results from differences of practical judgment in applying an admitted rule, — the admitted rule being that opinion evidence is not generally receivable, and the difference arising from differing judgments as to what is and is not really to be called opinion evidence in the sense of the rule. It has been said, judicially, that "there is, in truth, no general rule requiring the rejection of opinions as evidence."[1] Without acceding quite literally to that, there is ground for saying that, in the main, any rule excluding opinion evidence is limited to cases where, in the judgment of the court, it

[1] Hardy *v.* Merrill, 56 N. H. 227, 241.

will not be helpful to the jury. Whether accepted in terms or not, this view largely governs the administration of the rule. It is obvious that such a principle must allow a very great range of permissible difference in judgment; and that conclusions of that character ought not, usually, to be regarded as subject to review by higher courts. Unluckily the matter is often treated with much too heavy a hand by the courts, and the quantity of decisions on the subject is most unreasonably swollen.

The rule excluding character evidence, when exactly stated, merely forbids the use of a person's general reputation, or of his actual character, as the basis of an inference to his own conduct. This rule is modern. In earlier times such evidence was freely used in our courts, as it still is in other than English-speaking countries. Undoubtedly, as a mere matter of reason, it often affords a good basis of inference; and, on the other hand, often, besides tending to subject a man to the operation of prejudice and malice, it is quite too conjectural and too slight to be safely used, and so comes within the condemnation of a general principle already mentioned.

On the rules regulating the examination of witnesses I will not dwell. They are full of practical sense, and are few, simple, and easily understood; although, like all rules for strenuous competitive struggles, nothing but practice and the observation of practice can bring them to a man's fingers' ends, or keep them there. Fortunately they allow much more discretion to the judges in administering them than is found in most of the rules of evidence. As to rules for the exclusion of witnesses, they have nearly disappeared. Little remains except what reason requires, viz., the exclusion of persons who are too young to be trusted, or too deficient in intelligence.

Finally, there are rules relating to documents, — as to the proof of their contents, of their execution, and of alterations in them. Of these a word or two should be said: He who would prove the contents of a writing must produce it bodily to the tribunal; and if it is lost or destroyed, otherwise than by evil contrivance of the party offering the evidence, then the contents may be proved by copy or orally. This rule, if wisely applied, is one of peculiar good sense, but there is discordance as to the scope of it, and as to what may excuse one from the application of it. It is obscurely connected with the old law of profert, which required the physical production in court, in the course of pleading, of any document which was the basis of action or defence.

As regards the proof of execution, where the document is attested, the rule runs back to the most ancient periods of our law. The document witnesses were formerly summoned with the jury, and joined in their secret deliberations.[1] This was done until about four centuries ago, and perhaps later. From these older periods there survived a rigor of requirement as to summoning the attesting witnesses, and a precedence in that method of proving the execution over all others, which have long been irrational; the law is still encumbered with many troublesome remnants of the old doctrine and many ill-instructed decisions.

As regards the proof of alterations in documents the cases are full of confusion. Fragments of substantive law embarrass the rules of evidence relating to this subject; and it is further intolerably perplexed by the introduction of a quantity of jargon about presumptions and the burden of proof, which often conceals the lack of any clear apprehension of the subject on the part of those who use it, and often disguises the true character of sound decisions.

Such is a rough outline of the chief characteristics of our law of evidence. Speaking exactly, this part of the law deals merely with the business of furnishing to the tribunal such information as to matters of fact in issue as is needed in order to decide the dispute, or to make any desired order. It assumes a properly qualified tribunal, one that knows an evidential thing when it sees it. It does not re-enact, nor does it displace, the main rules which govern human thought. These are all taken for granted. But it does exclude, by rules, much which is logically probative. It also regulates the production of witnesses, and documents, and visible objects offered for inspection as the basis of inference.

The chief defects in this body of law, as it now stands, are that motley and undiscriminated character of its contents which has been already commented on; the ambiguity of its terminology; the multiplicity and rigor of its rules and its exceptions to rules; the difficulty of grasping these and of perceiving their true place and relation in the system; and of determining, in the decision of new questions, whether to give scope and extension to the rational principles that lie at the bottom of all modern systems of evidence, or to those checks and qualifications of these principles which have

[1] Thayer, Prelim. Treatise on Ev. 97.

grown out of the machinery through which our system is applied, viz., the jury. These defects discourage and make difficult any thorough and scientific knowledge of our system and its peculiarities. Strange to say such a knowledge is very unusual, even among our judges.

The actual administration of this system is, indeed, often marked by extraordinary sagacity and good sense, particularly in England. In that country it is uncommon to carry questions of evidence to the upper courts. In England the influence of the judge at *nisi prius* goes to check controversy over points of evidence far more than here, and the relations between bench and bar are such that this influence is generally effectual.[1] Moreover, owing to that great and just confidence in the capacity of the judges which is felt in England, they are able to exercise a beneficent control over the subject through their extensive power of making rules.[2]

In our own administration of the law of evidence too many abuses are allowed, and the power of the courts is far too little exercised in controlling the eager lawyer in his endeavors to press to an extreme the application of the rules. Sharply and technically used, these rules enable a man to go far in worrying an inexperienced or ill-prepared adversary, and in supporting a worthless case. Our practice, which shows so little of the sensible moderation of the English barrister, and so little of the vigorous control of the English judge, in handling evidence at the trial, operates in another way to injure the rules of evidence. Questions of this sort are generally taken up on exceptions, a procedure, never common in England and now abolished there, which presents only a dry question of law, — not leaving to the upper court that power to heed the general justice of the case, which the more elastic procedure of the English courts so commonly allows; and tending thus to foster delay and chicane.

In neither country is the system of evidence consistently admin-

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[1] It surprises English lawyers to see our lively quarrels over points of evidence. One of them writing from New York to the "London Times," some years ago, spoke of being present at the trial of a case of trespass to land between two farmers. It involved questions of old boundaries. "The nature of the case," he said, "made it inevitable that many questions of evidence should be raised. But never, not even in a pedigree case, or an indictment for not repairing a road, did I see so many objections to the reception of evidence taken; and I am inclined to think that points of evidence are discussed far more frequently than is now the case with us." The observation of any one who has watched trials in the English courts will emphatically confirm these impressions.

[2] See Wilson's Judicature Acts, 7th ed. (1888), *passim;* and see comments in HARVARD LAW REVIEW, viii. 224, on Order XXX., Rule 7, promulgated in August, 1894.

istered. Wherever evidence is taken by commission or deposition, in this country at least, the rules of exclusion largely break down; that is to say, in a great proportion of trials where there is no jury, viz., in equity, patent, and admiralty cases, and, more or less, in jury cases at the common law. In such cases the magistrate who takes the evidence notes any objection that is made, but does not and cannot omit to set down the evidence actually given. There it stands, and it is handed up to the court or jury, and is found on the paper with all the rest of the evidence. In most instances there is small profit in fighting over the admissibility of evidence which is already in, and has once been read by or to the tribunal; under such circumstances the whole doctrine of the exclusion of evidence is in a great degree inoperative.

II. So much for the system of evidence which we have. Let me come to the second question: What should we have, and how may we get it?

We should have a system of evidence of a character simple, aiming straight at the substance of justice, not nice or refined in its details, not too rigid, easily grasped and easily applied. All this is necessary, because it is for use in the midst of the eager competition of trials, where time is short and decisions must be quickly made. Long discussion, and delay for reflection, are impracticable; and in a secondary and incidental part of the law, like evidence, however important it be, — and it is very important, for the putting in or keeping out of evidence means often the difference between gaining your case or losing it, — decisions in the lower court should generally be final.

In the pressure of actual trials, where, often, the interests and passions of men are deeply stirred, and all the resources of chicane are called into play and directed by great abilities to obstruct the movements of justice, — the rules of evidence and procedure ought to be in a shape to second promptly the authority of the courts in checking these familiar efforts. In the rulings of judges at the trial much depends on momentary and fleeting considerations, addressed to the practical sense and discretion of the court, and not well admitting of revision on appeal. There are many things in which even now the discretion of the courts goes far. A thousand important matters, of one sort and another, are finally disposed of at the trial, — without the right of appeal. The all-important decision of the jury itself is final, except as the court, for a few rea-

sons, may set it aside, *e. g.*, as being irrational or against evidence. In like manner, on the whole of the secondary and adjective part of the law, there should be little opportunity to go back upon the rulings of the trial judge; there should be an abuse, in order to justify a review of them by an appellate court. In order to make this practicable, the rules of evidence should be simplified; and should take on the general character of principles to guide the sound judgment of the judge, rather than minute rules to bind it. The two leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it. And then, as regards the mass of detailed rules, these should mainly be subject at all times to the shaping and controlling power of the supreme courts, in the different jurisdictions, in making their rules of court. The rules of evidence on which we practise to-day have, in fact, mostly grown up at the hands of the judges; and, except as they be really something more than rules of evidence, they may, in the main, properly enough be left to them to be modified and reshaped.

But, in doing this, let me hasten to say, it would be necessary at the outset to discriminate between what are really rules of evidence, and what are only nominally such. It would never do to submit to the control of the judges, through rules of court, the great mass of substantive law that now lies disguised under the name of the law of evidence. It is, indeed, on every ground, high time that this separation were made. It is discreditable to a learned profession to allow the subject to lie in the jumble that now characterizes it in this respect. To do this will tend wonderfully to simplify and clear the subject of evidence as we now have it, and it will also remove a chief objection to certain needed reforms, and especially to this of placing in the hands of the judges a far larger discretion in shaping and modifying the system than is now allowed them. This, then, is the first step to be taken; it is necessary in any event; and it is practicable, if undertaken by competent hands.

When once this extrusion of foreign matter is accomplished, the process of simplifying and restating the rules of evidence, in the proper sense of the word, can go forward. To accomplish this, some legislation would probably be necessary; it should take the shape of conferring authority on the courts, or expressly recognizing it as already rightfully in them, to change and mould the

rules of evidence, subject to such limitations as may seem prudent, — subject only, it might be hoped, to a few large and simple principles which are the skeleton of our present system. We can hardly hope for wisdom enough in the legislature to accomplish in any other way what is needed. Good legislation of any sort, in the way of law reform, is very hard, almost impossible, to get. Yet a small and instructed body of lawyers, in any legislature, can overcome even this difficulty; and such a body, in any community, might well hope to carry through so reasonable a provision as that of charging the courts with a general control over the rules of evidence, when once they themselves were persuaded of the need of it. But I do not forget that, on such subjects as this, the lawyers are often the persons chiefly needing to be roused and convinced, and that this is the greatest obstacle to be overcome. This was strongly put two years ago by a leading member of the bar.[1] In recommending to a body of young lawyers as their special work, "for all their lives," — aside from the necessary work of their immediate calling, — the great business of "the amendment of the law," using the words in a large sense, the distinguished speaker recognized the fact "that no class in modern society is more conservative, more timid in promoting, more resolute in resisting, alterations in existing law, than the body of which we are members." And after alluding to other possible reasons for what he calls "the dull conservatism of many lawyers," he adds that "there is a timidity borne of mere ignorance. . . . And so it is the narrowness of vision, the imperfect intelligence of many lawyers which makes them . . . apprehensive of changes which they think untried experiments." These excellent suggestions point to the chief difficulty in accomplishing such a change as I am proposing, so far as it is dependent on legislation. Yet, as I said, a few enlightened and resolute lawyers, men of recognized legal capacity and character, could, with good fortune, carry through any of our legislatures some such prudent measure of reform as I am suggesting. In Massachusetts we have had a typical illustration of what a well-trained lawyer may do for his profession in the way of law reform, by the simplest methods. Nearly fifty years ago Mr. B. R. Curtis, who, two years later, in 1851, became Mr. Justice Curtis of the Supreme Court of the United States, being a member of the Massachusetts House of Representatives, introduced a resolution for the appointment of three commissioners "to revise and

[1] Address by Hon. Theodore Bacon, before the Graduating Class of the Yale Law School, in 1896.

reform the proceedings in the courts of justice in this Commonwealth, except in criminal cases, subject to the approval of the legislature." It was unanimously adopted, and Mr. Curtis, with two other leading lawyers of the State, was appointed for the task. In 1851 they prepared the draft of what has been since known as the "Practice Act." The commission proceeded cautiously, in some respects too cautiously, and consulted the bench and bar freely; their measure was accompanied by an admirable report of some twenty octavo pages, understood to have been prepared by Judge Curtis, which has still the merits of a legal classic, giving the reasons for their action. The bill was but slightly changed by the legislative committees to whom it was referred; and it passed without dissent. It was a careful but radical change of the whole civil procedure of the State at common law. A few changes were made in 1852 by a repeal and re-enactment, but they left the law substantially the same, and Massachusetts has lived under it with success and great satisfaction ever since, making only occasional improvements. In Connecticut, in 1879, similar reforms were accomplished under the leadership of a distinguished lawyer, now a member of the Supreme Court of that State;[1] and other instances might be cited in other States of our country. In England everybody knows of the great measures, under the general title of the Judicature Acts, which have been carried through in the last quarter of a century, under the impulse of Lord Selborne.

But even without legislation, the judges have great power over the subject, direct as well as indirect. A system which mainly came into life at their hands and has been constantly moulded by them, by way of administering procedure, they can also largely reshape and recast, if they will. But no court should enter upon this task that is not sure of its ground, that does not pretty well understand the history, nature, and scope of the existing rules, and see pretty clearly where it means to come out. With these preparations, however, the course taken from time to time by the English judges is, in a good degree, open to ours. By using strongly their power to shape the procedure and modify it by rules of court, they can, directly, do much; and by discouraging an unjust and overstrained application of the rules of evidence, by construing them freely and in a large way, by refusing to interfere with the rulings of the lower courts except in cases of abuse or of clear and important error, by

[1] Hon. Simeon E. Baldwin.

encouraging a more elastic procedure in shaping questions for the upper court, by recurring always to fundamental principles, and inclining always to give effect to these as against exceptional and special rules, and generally by recognizing, resolutely and persistently, the subordinate, auxiliary, secondary, wholly incidental character and aim of the rules of evidence (properly so-called), they can indirectly do a very great deal. Let me, however, again and again repeat, and with emphasis, that I mean, in speaking of the secondary character of the rules of evidence, to refer only to rules of evidence properly so called; and let me again and again insist that the body of rules now called by that name should, without needless delay, be purged of that spurious matter, and relieved of that great mass of material, *rudis indigestaque moles*, belonging to the substantive law, to the general rules of legal reasoning, and to other parts of the law of procedure, of which I have repeatedly spoken.

What about the jury? some one may ask. If our present system of evidence has been called out by the jury, and we still have that, why must not the law of evidence continue? Well, that suggests the question, whether the jury itself must continue? The jury system is already much modified. The experience of England, Massachusetts, and some other States, where for some years past in most civil cases, no person has a jury trial unless he asks for it before a certain time, has been satisfactory. This has worked a great cutting down in the number of jury trials. It appears to me that, with or without the aid of changes in constitutional provisions, more may well be done in reducing the number of jury trials in civil cases; and that in criminal cases, more may be done than now in the same direction. Personally I should think that it was not wise to abolish jury trial in civil cases, — of course not in criminal cases, — but only that it should be restricted still farther. Indeed I would restrict it narrowly, for it appears to me, among other things, to be a potent cause of demoralization to the bar. In so far as it has been or may be restricted, the objections to any changes in our system of evidence which are founded on its relation to jury trial are lessened.

But apart from all that, it may be said, truly, that juries are now much less helped and restrained by the judicial contrivances which find expression in our rules of evidence than is sometimes thought. Judges, to a large extent, sit quiet and let parties try their cases with as loose an application of the rules of evidence as they themselves may wish. Indeed, this has been judicially declared to be

the right of litigating parties in all cases. "As the rules of evidence," said Chief Justice Shaw, in 1848,[1] "are made for the security and benefit of parties, all exceptions may be waived by mutual consent." Allowing that this is overstated, it may still be insisted that the old conceptions of a jury's incapacity, and of the need of so much exclusion, were overstrained, and that they are largely inapplicable to modern juries.

But I will leave aside any question of changing the jury system, and assume that it is to be in no degree restricted. Undoubtedly, at least in my opinion, it will long continue, and should continue, to a greater or less extent. So long as it does, we must have a law of evidence, *i. e.*, a set of regulative and excluding precepts, enforced by the presiding officer of the meeting, viz., the judge. In exercising this function the court must continue to apply certain great principles, such as these: (1) That the jury must, so far as possible, personally see and hear those whose statements of fact, oral or written, they are asked to believe; (2) that witnesses must, so far as possible, testify orally, publicly, under strong sanctions for truth-telling, and that both parties should have full opportunity to examine or cross-examine under the court's supervision; (3) that in the case of writings the jury must, so far as possible, personally and publicly inspect such as they are expected to act upon; (4) that whatever is said or shown to the jury, or privately known to them, bearing on the case, must be said, shown, or stated publicly, in presence of the court and of all parties concerned; (5) that the execution of solemn documents must be clearly shown, and that they must be faithfully construed according to the written terms; (6) that the jury should not be obliged or permitted to listen to what will unnecessarily delay the case, or too much tend to confuse or mislead them; (7) that the jury should be aided by the opinions, on matters of fact, of persons specially qualified, wherever they are likely to be materially helped by it; (8) that the court should have power to review and set aside the verdict of the jury, in order to prevent gross injustice, and secure conformity to the rules of law and the requirements of sound reason, but in no case substituting their own judgment for that of the jury, and always exercising a merely restraining power.

If a few comprehensive, fundamental principles like these, derived from experience and at the bottom of our present system, be followed, construed, and applied in a liberal way, and the application

[1] Shaw *v.* Stone, 1 Cush. 228, 243.

of them be kept steadily under the oversight and control of the court, by being dealt with as rules of court, it appears to me that our system of evidence might be vastly improved, and be made conformable to the changing convenience of mankind.

And now, finally, if it be said that we have not judges fit for the large discretion thus to be confided to them, several things may be said in answer: —

1. That sort of remark about our judges is often made when one has in mind, not the judges of his own courts, or of any courts that he knows most about, but some other judges in some other parts of the country. Admitting that the statement may be true in some places, it is not true of the higher Federal courts anywhere, or of the higher courts in several of our States. It is not true in England. Wherever it is not true, that particular jurisdiction need not be deterred from giving to its highest courts the proposed recognition and enlargement of discretionary power. And the example thus afforded will be likely to help matters elsewhere.

2. If the judges in any place are not fit for any given functions which those in other places exercise with benefit to the community, or which it is thought well to put upon them, that is a reason for changing the breed of judges. And we may remember that, in most of our States, a change, whether for better or worse, is only too quickly and easily possible.

3. The objection, however, may have another answer. Those who make it, forget, for the moment, how much discretion is already reposed in our judges, and exercised by them at every hour of the day and in every part of their functions. In imposing criminal sentences, in punishing contempts, in passing upon motions, in making rules of court and regulating practice and procedure,[1] in adopting rules of presumption, in determining the limits of judicial notice, in applying the rules of evidence, and in conducting trials generally, — in discharging these and other duties, a vast discretionary power is everywhere exercised. Men who can safely be intrusted with the discretion which the ordinary exercise of the judicial office imports, every day of the week, are fit to undertake the function that I am now suggesting.

James B. Thayer.

CAMBRIDGE.

[1] See, for example, as I am reminded by my colleague, Professor Smith, the experience in New Hampshire during the administrations of Chief Justice Bell and Chief Justice Doe.